UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

TRACY (SANDAGE) NAVRUDE, Plaintiff, vs. THE UNITED STATES OF AMERICA (USPS), Defendant.	No. C01-4039-PAZ **ORDER**

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I. INTRODUCTION

The plaintiff Tracy Navrude filed this action on April 18, 2001 (Doc. No. 1), alleging that on July 22, 1998, she was struck by a United States Postal Service ("USPS") vehicle as she was walking in a crosswalk in an intersection in front of a U.S. Post Office in Sioux City, Iowa. This matter is before the court to resolve disputes that have arisen in the course of the parties' discovery and expert disclosures.

On December 27, 2002, the defendant (the "Government") filed a motion and supporting brief (Doc. Nos. 32 & 37) requesting sanctions against Navrude pursuant to Federal Rule of Civil Procedure 37, for what the Government deems to be Navrude's "intentional and bad faith failure to disclose critical information requested by the government in discovery." (Doc. No. 32) In the motion, the Government asks for dismissal of Navrude's claims in this action with prejudice, or, alternatively, for a number of lesser sanctions, including an award of costs and attorney fees, and limitations on Navrude's claims and evidence. As part of its brief, the Government also moves to compel certain discovery responses from Navrude. (*See* Doc. No. 37, p. 18) On January 21, 2003, Navrude resisted the motions, filed a brief in support of her resistance, and filed a motion for a determination as to whether she must make expert disclosures with respect to her treating physician. (Doc. Nos. 42, 44, & 45, respectively) The Government filed a reply brief on January 31, 2003. (Doc. No. 47)

On February 6, 2003, these motions came on for hearing. The Government was represented at the hearing by Assistant United States Attorney Martha A. Fagg. Navrude was represented by attorney Michael J. Frey. The court now is prepared to rule on the pending motions.

II. DISCUSSION

The pending motions present the court with a number of issues arising out of Navrude's responses to the Government's discovery requests, and Navrude's alleged failure to make complete expert witness disclosures under Federal Rule of Civil Procedure 26(a)(2)(B). Clarifying the precise details of the Government's discovery requests, and Navrude's responses to the requests, is essential to a determination of whether her responses were deficient.[1] The court, therefore, will address each of the Government's discovery allegations in turn, and then will address the issue of expert disclosures.

A. False, Misleading, or Incomplete Discovery Responses

1. Background

On December 17, 2001, the Government propounded interrogatories and requests for production to Navrude. Navrude responded to these discovery requests on January 23, 2002. On February 7, 2002, and again on October 28, 2002, the Government took Navrude's deposition. The Government claims Navrude "blatantly misstated the truth" in her responses to the written discovery requests and in answering certain questions asked during her depositions. (*See* Doc. No. 37, p. 2) The Government further claims Navrude "has engaged in a clear pattern of misstatements, neglect and failure to disclose both material and relevant information in discovery." *Id*.

These are serious allegations, going to the heart of what is intended to be a voluntary and interactive system of discovery in the federal courts. The Eighth Circuit Court of

[1]The Government did not provide the court with any of these discovery materials, as required by LR 37.1(b) ("A party filing a motion objecting to a discovery request or to the sufficiency of a response to a discovery request must attach to the motion a copy of the disputed request and any response.") The court has, with some difficulty, gleaned the information needed to decide these issues either from representations in the parties' briefs or from exhibits attached to Navrude's brief in support of her resistance to the Government's motions. (*See* Exhibits to Doc. No. 44)

Appeals has explained, "'The purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice.'" *Mawby v. United States*, 999 F.2d 1252, 1254 (8th Cir. 1993) (quoting *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir. 1968)). "The rules are meant to insure that . . . parties can obtain '[m]utual knowledge of all the relevant facts gathered by both parties.'" *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 391, 91 L. Ed. 451 (1947)). If the Government's allegations are true, then Navrude's actions would thwart these purposes and prejudice the Government.

In interrogatory number 11, the Government asked Navrude the following question:

> Identify any and all other lawsuits, legal actions, administrative actions for social security or veteran's benefits, or other claims [or] procedures pertaining to any medical or emotional injury, ailment or condition. Please identify the nature of the occurrence or transaction giving rise to such suit or claim, and indicate any sum of money or benefits received by you in settlement or judgment thereof or in conjunction with your administrative claim.

(Doc. No. 44, Ex. 11, p. 3) Navrude responded, "none."

In document production request number 7, the Government asked Navrude to produce "all documents which contend, support, confirm, verify, substantiate or in any way relate to the items or elements of damages which plaintiff claims to have sustained as a result of the July 22, 1998, occurrence."[2] The court has not been provided with Navrude's response, but the United States claims her response was deficient because she failed to disclose that on December 23, 1998, she was driving a vehicle that was struck by a delivery truck.

In document production request number 9, the Government asked Navrude to produce, "All documents used to respond to defendant's request for interrogatories." (Doc. No. 44,

[2]This quotation is a summary of the request taken from the Government's brief. The court has not been provided with the actual discovery request.

Ex. 15, p. 2) Navrude responded, "Will produce." *Id.* In document production request number 11, the Government asked Navrude to produce, "All policies of insurance in existence at the time of this accident." *Id.* Navrude responded, "The plaintiff has ordered a copy of her health insurance in place at the time of this accident." *Id.*

In a deposition held on February 7, 2002, Navrude gave the following answers to questions by AUSA Fagg:

Question: It doesn't look like you've had many problems at all.

Answer: No.

Question: After the accident have you had any other traumas to your body?

Answer: No.

Question: No falls? No car accidents?

Answer: No.

(Doc. No. 44, Ex. 1, p. 35)

On October 28, 2002, in a second deposition, Navrude acknowledged that on December 23, 1998, she had been in a vehicle that was struck by a delivery truck, but Navrude claimed she was not injured in the collision. She also stated she did not think she had been involved in any other accidents, and specifically did not recall having "slipped and fallen." (Doc. No. 44, Ex. 9, pp 23-24)

The Government first complains Navrude made no mention of the December 23, 1998, incident involving the delivery truck in her written discovery responses or her first deposition. The Government also complains that on February 7, 2001, exactly one year before her first deposition, Navrude reported to a medical provider that she had slipped on some ice, but she failed to mention the incident in any of her discovery responses or during either of her depositions, including the second deposition when she was asked specifically if she recalled having "slipped and fallen." The Government further complains Navrude did not produced her automobile insurance policy in response to document production request

number 11. Finally, the Government complains Navrude did not, in response to interrogatory number 11, disclose that she had filed a Worker's Compensation claim arising out of an unrelated incident, or that she had filed more than one state court lawsuit.

With this background, the court turns to consideration of the individual discovery responses that are the subject of the Government's motions.

2. Interrogatory number 11

In this interrogatory, the Government asked Navrude to identify and give information about any claims she had made for medical or emotional injury. The Government complains that in responding to this interrogatory, Navrude did not disclose the delivery truck accident, the slip on the ice, a previous claim for Worker's Compensation, and other lawsuits she had filed in state court.[3] In its reply brief, the Government states the following:

> Plaintiff does not dispute that she did not disclose or produce documents indicating she had filed a Worker's Compensation claim. Plaintiff's second deposition, Exhibit E.[4] Whether plaintiff files claims for Worker[']s Compensation is relevant to her physical condition as well as goes to her propensity to file claims for damages. The fact she did not think her claim is relevant is no excuse for nondisclosure.

(Doc. No. 47, pp. 3-4)

Navrude responds that she was not injured in the delivery truck accident, and has made no claims for medical or emotional injuries arising out of the accident. She denies she ever asserted a claim against anyone for slipping on the ice. She denies that she filed a Worker's Compensation claim, although she acknowledges she twice was hurt on the job,

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[3]The Government did not provide the court with any details or evidence about the alleged Worker's Compensation claim or the state court lawsuits. (Doc. No. 37, pp. 6-7)

[4]The court has not been provided with the pertinent part of the deposition or the deposition exhibit.

which she disclosed to the Government in her answer to interrogatory number 4.[5] (*See* Doc. No. 44, Ex. 12, p. 3-4) Finally, she states the only state court lawsuit she has filed was for luggage lost by an airline, which did not involve a claim for medical or emotional injuries.

Before making this objection, the Government should have read its own interrogatory more carefully. There is no evidence that the delivery truck accident, the slip on the ice, or the lost luggage claim resulted in any "lawsuits, legal actions, administrative actions for social security or veteran's benefits, or other claims [or] procedures *pertaining to any medical or emotional injury, ailment or condition*." (Doc. No. 44, Ex. 11, p. 3, emphasis added)

Navrude specifically denies knowledge of any Worker's Compensation claim (Doc. No. 44, p. 6.), and nothing in the record before the court establishes that such a claim ever was filed.

The Government's objections to Navrude's answer to interrogatory 11 are overruled.

3. Document production request number 7

In this document production request, the Government asked Navrude to produce all documents that relate to items or elements of her claimed damages in this case. In its initial brief, the Government complained that Navrude should have disclosed the delivery truck accident in response to this request. (*See* Doc. No. 37, p. 7) The court fails to see

[5]In her second deposition, when asked if she had ever filed a "worker comp" claim, Navrude responded, "Yes. And that is written down in my interrogatory." (Doc. No. 44, Ex. 13, p. 39) From the context, it is clear she was referring to the fact that she suffered two on-the-job injuries, and not to any specific claim or proceeding. There is no evidence Navrude ever asserted an actual Worker's Compensation "claim" as a result of either of the injuries, although there is some indication her employer may have filed a "First Report of Injury." The court finds that if such a report was, in fact, filed, Navrude likely would not have known about it, or if she did, would not reasonably have considered it to be a "claim."

why the disclosure of the accident was necessary to properly respond to this request, especially in light of Navrude's contention that she was not injured in the accident.

In its reply brief and during the February 6, 2003, hearing, the Government clarified that in this request, it is seeking an itemized list of damages. Navrude responds that she has provided just such an itemization. (*See* Doc. No. 44, Exs. 18 and 19)

The court finds Navrude has provided the Government with an adequate response to this request, and the Government's objections to Navrude's response are overruled. However, all parties have a continuing obligation to update their discovery responses.[6] Therefore, Navrude is directed to update exhibits 18 and 19 by **February 21, 2003**.

4. Document production request number 9

In this document production request, the Government asked Navrude to produce, "All documents used to respond to defendant's request for interrogatories." Navrude responded, "Will produce." If the court correctly understands the Government's position, the Government is complaining because Navrude did not disclose the delivery truck accident in responding to this request. (*See* Doc. No. 37, p. 7) Because documents relating to the delivery truck accident apparently were not used in answering the Government's interrogatories, this objection is overruled.

5. Document production request number 11

In this document production request, the Government asked Navrude to produce all of her insurance policies. She responded that she had ordered and would produce her health

[6]In its order following a status and scheduling conference on October 10, 2002, the court ordered the parties to update their discovery responses to provide full, complete and accurate responses to all discovery. (*See* Doc. No. 28)

insurance policy. The Government now complains because she has not produced her automobile insurance policy.

The Government initially did not object to Navrude's response to this request, but later complained about Navrude's failure to produce her automobile insurance policy. Navrude then produced the declarations page of the policy. The Government has not offered an explanation as to why the declarations page is not an adequate response, or indeed, as to why it even wants or needs this information.

The Government's objection to this response is overruled.

6. Answers to deposition questions

The answers Navrude gave during her two depositions are significantly more problematic than the issues addressed thus far in this order. The court will address the two serious issues arising out of the depositions separately.

During Navrude's first deposition, on February 7, 2002, she was asked specifically if she had been involved in any "car accidents." She responded, "no." In fact, on December 23, 1998, she was driving a vehicle that was struck by a delivery truck. In her second deposition, she explained that the delivery truck accident had not occurred to her during her first deposition because she had not been injured in the accident and there had been minimal damage to her vehicle. (*See* Doc. No. 4, Ex. 9, p. 23) She stated her failure to disclose the accident was unintentional. *Id.*

The Government responds that this was a serious accident involving "extensive" damage to Navrude's vehicle. (Doc. No. 47, p. 2, and Ex. A-2) The Government attached photographs of the vehicle to emphasize this point. (*Id.*, Ex. B) The Government also

points out that Navrude consulted with a neurologist two weeks after the accident, but did not disclose the accident to the neurologist or to any of her other physicians.[7] (*Id.*, p. 5)

Navrude replies that the deposition question about "car accidents" was misleading, because it followed other questions about "traumas" to her body and "falls." She asserts that she answered the question about "car accidents" in the context of an accident that produced a physical injury or trauma. (*See* Doc. No. 44, p. 2-3; Ex. 2, pp. 50-51) She apologizes for failing to disclose the accident during the deposition, but claims her omission was unintentional. She asserts the accident was minor, pointing out that the only damage to her vehicle was to the passenger door, which her husband was able to fix by himself. (*Id.*, at 3) She points out that the investigating officer reported no injuries from the accident. (*Id.*, Exs. 3 & 4) She also points out that she had scheduled the appointment with the neurologist before the delivery truck accident. (*Id.*, Ex. 7)

While Navrude certainly should have disclosed the accident during her first deposition, the court cannot say definitively that the omission was intentional. This is a matter best addressed as a question of Navrude's credibility during cross-examination at trial. The Government's objections relating to this testimony are overruled.

During Navrude's first deposition, she was asked if she had suffered any traumas to her body, and she answered "No." During her second deposition, she was asked if she recalled having "slipped and fallen," and she replied, "Not that I recall." The Government claims it later found a record of a medical care provider, dated exactly one year before the date of Navrude's deposition,[8] containing a statement that Navrude had slipped and fallen

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[7]The fact that Navrude did not disclose the accident to her doctors actually weighs in favor of a finding that her failure to mention the accident in her first deposition was unintentional. It is likely that if she were injured in an automobile accident arguably caused by a delivery company, she would have been eager to support her claim against the company by reporting her injuries to her doctors.

[8]In its brief (Doc. No. 37), the Government indignantly, and repeatedly, states the "slip and fall" (continued…)

on some ice.[9] On February 7, 2001, Navrude was seen by a physical therapist at St. Luke's Hospital in Sioux City, who noted the following: "Slipped on ice last week – soreness from this had [decreased]. On Monday had several hours of constant pain down [right] leg." (Doc. No. 44, Ex. 8)

Navrude responds that her response to the question about whether she had "slipped *and* fallen" was technically correct, because the medical record reflects only that she had "slipped," not that she had "fallen." This technical reading of the deposition is not convincing, and does not explain why Navrude did not give this information in response to the question at her earlier deposition about whether she had suffered any "traumas."

In her brief, Navrude asserts she did not recall the slip on the ice. She also responds to the Government's arguments as follows:

> The fact of the matter is that [Navrude] had been referred to physical therapy in late 2000 and early 2001 because of continued low back and hip pain from this July 23, 1998 accident. This apparent slip she suffered looks to be a very minor temporary aggravation of her chronic low back and hip problems caused by the postal van. She was discharged from physical therapy the very next visit on 2/13/01.

(Doc. No. 44, p. 5)

Again, Navrude should have disclosed her slip on the ice during both her first and second depositions, but the court cannot say definitively that the omission was intentional. This issue also can be addressed as a question of Navrude's credibility during cross-examination at trial. Furthermore, although Navrude gave incomplete deposition responses

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[8](…continued)
had occurred a few days before the deposition. The Government corrected this error in a subsequent filing. *See* Doc. No. 35.

[9]Again, the Government failed to provide the court with a copy of the medical record. Navrude's counsel attached the record to his brief. (Doc. No. 44, Ex. 8)

regarding the truck accident and the slip on the ice, the court does not believe more complete responses would have changed the opinions of the Government's medical experts. The Government has not shown that its experts would have to reevaluate the case or change their opinions if they were informed Navrude was involved in an automobile accident in which she suffered no injuries and sought no medical treatment, or that she slipped on the ice and had some soreness she reported to a physical therapist. The Government's objections relating to this testimony are overruled.

B. Adequacy of Expert Disclosures

The Government states Navrude has designated Dr. Richard Salib as an expert witness in this case, but Navrude has not complied with the requirements of Federal Rule of Civil Procedure 26(a)(2)(B).[10] The deadline for making expert disclosures was May 15, 2002. During a telephone status and scheduling conference on October 10, 2002, the parties raised this issue with the court. Navrude's attorney argued that because Dr. Salib was a treating physician, Rule 26(a)(2)(B) should not apply. Without benefit of briefing or research, the court advised the parties preliminarily that these disclosures probably would not be required so long as Navrude did not intend to offer any opinion testimony from Dr. Salib, but if Navrude intended to ask Dr. Salib to give opinion testimony under Federal Rule of Evidence 702, then the Rule 26(a)(2)(B) disclosures would be appropriate. The court invited the parties to file motions and briefs addressing the issue, and so indicated in its order following the status conference.[11] Navrude has presented this issue to the court in her motion.[12]

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[10]Rule 26(a)(2)(B) provides, with respect to a witness who is retained or specially employed to provide expert testimony, a party must provide "a written report prepared and signed by the witness." The rule further provides, "The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

[11]The Government claims, "This court informed plaintiff in an October hearing that if she wanted to use Dr. Salib as an expert in causation, that Dr. Salib would be required to submit a report which complies with Rule 26(a)(2)(B)" (Doc. No. 47, p. 4) The court did not issue such a ruling in the hearing, but only informally advised the parties of the court's likely ruling and invited the parties to brief the issue.

[12]The court is displeased with the fact that neither of the parties raised this issue for determination until three months after the hearing in which the issue was discussed, and about three months prior to trial. Either party could have raised the issue by way of a motion appropriate to that party's position in the matter. Because the court views both parties as dilatory in this matter, the court overrules the (continued…)

Navrude cites cases from numerous federal courts in support of her position that full Rule 26 disclosures are not required for a treating physician. (*See* Doc. No. 45, ¶ 5) The Government has not offered any authorities to the contrary, nor has the Government propounded discovery requests designed to exact detailed information regarding the doctor's opinions.[13]

The starting point for determining whether a treating physician is subject to Rule 26(a)(2)(B) disclosures is the first sentence of the Rule itself, which requires the detailed, written disclosures "with respect to a witness who is retained or specially employed to provide expert testimony." Courts draw a distinction between "hired guns" who examine a patient or a patient's records for purposes of litigation, and treating physicians whose opinion testimony "is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial." *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D. Colo. 1995); *accord Sprague v. Liberty Mutual Ins. Co.*, 177 F.R.D. 78 (D.N.H. 1998); *Zurba v. United States*, 202 F.R.D. 590 (N.D. Ill. 2001). A treating physician's opinions regarding

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[12](…continued)
Government's objection to the timeliness of Navrude's disclosures.

[13]*See Duluth Lighthouse for the Blind v. C.G. Bretting Manufacturing Co.*, 199 F.R.D. 320, 326 n.8 (D. Minn. 2000), in which the court noted:

> While the automatic disclosures, which otherwise would be required by Rule 26(a)(2), can be thwarted by the identification of "treating physicians" as experts, or by the designation of employee-experts, that does not mean that an opposing party would be blind-sided by such identifications, or designations. Nothing prohibits the opposing party from serving Interrogatories, and Requests for Production of Documents, which could exact the same level of opinion disclosures as are contemplated by Rule 26(a)(2), but [the defendant], here, did not serve such pointed discovery requests.

Similarly, the Government in the present case failed to follow up with either "pointed discovery requests" or a motion to compel.

causation, degree of permanent disability, and need for future medical care "are a necessary part of the treatment of the patient." *Id.; see Shapardon v. West Beach Estates*, 172 F.R.D. 415 (D. Haw. 1997).

A key factor in determining whether a treating physician is subject to Rule 26(a)(2)(B) disclosures is "the scope of the proposed testimony." *Wreath v. United States*, 161 F.R.D. 448, 450 (D. Kan. 1995). To the extent a treating physician "limits his or her testimony to the patient's care and treatment, the physician is not 'specially retained' despite the fact that the witness may offer opinion testimony under Fed. R. Evid. 702, 703, and 705." *Starling v. Union Pacific R.R. Co.*, 203 F.R.D. 468, 477 (D. Kan. 2001) (citing *Wreath*, 161 F.R.D. at 450); *see Soll v. Provident Life & Acc. Ins. Co.*, 2002 WL 1461891 at *5 (E.D. La. July 5, 2002); *see also Hoover v. United States*, 2002 WL 1949734 (N.D. Ill. Aug. 22, 2002) (slip op.) (discussing history of amendments fo Rule 26 in context of whether party seeking to depose treating physician must pay physician's "reasonable fee"). Thus, "a treating physician may testify about that which is related to and learned through actual treatment of the [patient], and which is based on his or her 'personal knowledge of the examination, diagnosis and treatment.'" *Id.* (quoting *Mangla v. Univ. of Rochester*, 168 F.R.D. 127, 139 (W.D.N.Y. 1996)); *accord Goeken v. Wal-Mart Stores, Inc.*, 2001 WL 1159751 (D. Kan. Aug. 16, 2001) (citing *Wreath*). The trial court has the discretion to limit or prohibit a treating physician's opinion testimony that goes beyond information obtained during the physician's care and treatment of the patient, or if the court determines the physician was retained specifically to develop opinion testimony. *Id.*; *Soll, supra.* For example, if a treating physician asks to review medical records from another health care provider for the purpose of rendering opinion testimony, then the physician may be considered "specially retained," and therefore subject to the requirements of Rule 26(a)(2)(B), despite having also treated the patient. *Brown v. Best Foods, Inc.*, 169 F.R.D. 385, 389 (N.D. Ala. 1996) (citing *Wreath*, 161 F.R.D. at 450); *see Shapardon, supra.*

Similarly, if an attorney selects the physician who provides treatment for the patient, "it is presumed that the physician was selected for expert testimony." *Hall v. Sykes*, 164 F.R.D. 46, 49 (E.D. Va. 1995). However, merely because a treating physician is paid for his or her time to testify does not make the physician a retained expert subject to Rule 26(a)(2)(B) disclosures. *Sprague*, 177 F.R.D. at 81.[14]

The court finds Navrude is not required to make Rule 26(a)(2) disclosures with regard to Dr. Salib, so long as the doctor's testimony at trial will be limited to opinions gleaned from the doctor's own care and treatment of Navrude.[15]

C. Motion for Sanctions

Because the court has overruled the Government's objections to Navrude's discovery responses, the Government's request for sanctions is moot. None of the inadequacies in Navrude's discovery responses (whether actual or simply as perceived by the Government) comes close to the level of discovery abuses addressed by the court in *Tyler v. Iowa State Trooper Badge No. 297*, 158 F.R.D. 632 (N.D. Iowa 1994), upon which the Government relies, or other similar cases from this court and the Eighth Circuit.

The Government's request for sanctions is **denied**.[16]

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[14]For an excellent, comprehensive discussion of the issue of treating physicians as expert witnesses, under both Iowa and federal law, *see* Christopher W. Dyer, Note, *Treating Physicians: Fact Witnesses or Retained Expert Witnesses in Disguise? Finding a Place for Treating Physician Opinions in the Iowa Discovery Rules*, 48 DRAKE L. REV. 719 (2000).

[15]The point is largely moot, however, given that Navrude has now provided the Government with most of the information required by the Rule.

[16]*See Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000), in which the court held:

> Discovery sanctions for failure to comply with Rule 26(a)(2) are reviewed for abuse of discretion. *See Miksis v. Howard*, 106 F.3d 754, 758 (7th Cir. 1997). A court does not abuse its discretion "unless one or more of the following circumstances is present: (1) the record contains

(continued…)

III. CONCLUSION

For the reasons discussed above, the Government's motion for sanctions (Doc. No. 32) and motion to compel (Doc. No. 47) are **denied**. Navrude's motion (Doc. No. 45) for Rule 26(a)(2)(B) finding is **granted**.

IT IS SO ORDERED.

DATED this 11th day of February, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[16](…continued)

> no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary." *Id.* (quoting *Gile v. United Airlines*, 95 F.3d 492, 495 (7th Cir. 1996)).